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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE**

FAYE IRENE GUENTHER, an | No. 2:22-cv-00272-TOR  
individual,

**Plaintiff,**

## **PLAINTIFF'S OPPOSE**

V.

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

JOSEPH H. EMMONS, individually,  
and OSPREY FIELD CONSULTING  
LLC, a limited liability company,

**NOTE ON MOTION CALENDAR:**  
December 5, 2024, at 9:00 a.m.

### Defendants.

PLAINTIFF'S OPP. TO DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT  
Case No. 2:22-cv-00272-TOR

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1 Plaintiff Faye Guenther respectfully opposes Defendants' (collectively,  
 2 Emmons) summary-judgment motion. Emmons first mistakenly contends Guenther  
 3 must prove actual malice because his flyers touched matters of public concern. But  
 4 whether a plaintiff is a public figure required to prove actual malice turns on whether  
 5 she injected herself into a live, preexisting public controversy—an actual debate—  
 6 not the content of the defamer's speech. No such debate predated Emmons's  
 7 flyering, so Guenther is a private plaintiff who need show only negligence.

8 Even if Guenther needed to establish actual malice, moreover, summary  
 9 judgment would still not be appropriate because the record here contains  
 10 circumstantial evidence—Emmons's hostility to alleged sexual harassers,  
 11 knowledge of his sources' hostility, and a deliberate intent to avoid the truth, among  
 12 other evidence—sufficient to allow this issue to proceed to trial.

13 Emmons next contends he is not responsible for Guenther's harm from his  
 14 flyering. But republishers of defamatory material, like Emmons, are liable for harm  
 15 from the republished material to the same extent as original publishers. And  
 16 Emmons cannot rely on the Uniform Correction or Clarification of Defamation Act  
 17 (UCCDA) to deny Guenther presumed or reputational damages because she has  
 18 produced evidence of falsity and Emmons never issued a correction.

19 Finally, Emmons is not entitled to judgment on Guenther's false light claim  
 20 because, again, her defamation claim does not fail as a matter of law and the record

1 shows at least triable issues on actual malice. The Court should deny Emmons's  
 2 motion in its entirety.

3 **STATEMENT OF FACTS<sup>1</sup>**

4 In September 2021, UFCW Local 1439 President Eric Renner called UFCW  
 5 Local 21 President Faye Guenther to explore a merger between their locals. ECF No.  
 6 104 at 3. They met in late October to discuss the merger and then sought permission  
 7 from the UFCW International to begin formal discussions. ECF No. 104 at 3.

8 On November 13, 2021, UFCW Local 555 President Dan Clay emailed Marc  
 9 Perrone, the UFCW President, opposing the merger. *Id.* Clay had been a longtime  
 10 friend and collaborator of Guenther's until 2019. *Id.* at 2–3. As of Clay's November  
 11 2021 email, the potential merger was unknown beyond a handful of top local and  
 12 International leaders. *Id.* at 3. Perrone formally approved merger discussions on  
 13 December 2, 2021. *Id.* at 4. Guenther and Renner then discussed the merger with  
 14 their staff and advisers but not publicly. *Id.* Each of the two locals' Executive Boards  
 15 met on December 14, 2021, to discuss the merger in confidential, executive sessions.  
 16 *Id.* at 4. Both Boards approved putting the merger to a vote of their members. *Id.*

17 In December 2021, Local 1439 mailed its members notice of the merger-vote  
 18

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19 <sup>1</sup> Guenther previously set forth the material facts in detail, ECF No. 104 at 1–10, and  
 20 now reprises them more summarily.

1 meetings, and on January 6, 2022, Local 21 mailed its members notice of general  
 2 membership meetings where they could vote on the merger. SDF, ¶¶ 45–46.<sup>2</sup> Neither  
 3 local publicly campaigned for the merger. ECF No. 105, ¶¶ 55, 61. And no press  
 4 reported on it until after March 2022, when the merger had concluded. SDF, ¶ 87.

5 The meetings at which members voted on the merger occurred in January  
 6 2022. SDF, ¶¶ 47, 53. Guenther sent experienced Local 21 staff to Local 1439’s  
 7 meetings to ensure they complied with applicable legal and UFCW-constitutional  
 8 requirements. SDF, ¶¶ 48–49. She initially planned to join those meetings herself for  
 9 the same purpose but couldn’t because she contracted COVID. *Id.*

10 Local 1439’s members approved the merger by a vote of 191 to 5 and Local  
 11 21’s members approved the merger by a vote of 207 to 11. SDF, ¶¶ 51, 54. Only  
 12 approximately 0.8% of both locals’ members voted. SDF, ¶ 54. The merger became  
 13 effective March 1, 2022. SDF, ¶ 54.

14 It did so notwithstanding Clay’s efforts to sabotage the merger. ECF No. 104  
 15 at 5–8. He instructed Local 555’s contracted political director, Mike Selvaggio, to  
 16 mail 1,000 flyers to shop stewards and managers at grocery stores throughout  
 17 Washington. *Id.* at 5; SDF, ¶¶ 57–60. The flyers accused Guenther of helping former  
 18 UFCW Local 367 President Angel Gonzalez cover up sexual harassment charges,

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19  
 20<sup>2</sup> “SDF” refers to Plaintiff’s accompanying Statement of Disputed Material Facts.

1 paying him off to install her puppet Mike Hines, helping Renner hide from sexual  
 2 harassment charges, and landing him a cushy new job. SDF, ¶ 60.

3 Those statements were false. ECF No. 104 at 8–9; SDF, ¶ 77. As of the  
 4 flyering, Guenther knew nothing about any sexual harassment allegations Gonzalez  
 5 faced or Local 367’s resulting settlement; never paid Gonzalez off for anything; did  
 6 not influence Hines’s advancement at Local 367; and did not know the substance of  
 7 the complaints against Renner—only that Local 1439 had an internal conflict that  
 8 had settled. *Id.*; SDF, ¶¶ 9–10.<sup>3</sup> In fact, Guenther became a life-long advocate against  
 9 sexual abuse and harassment, including during her tenure at UFCW Local 21 and  
 10 3000, after being the target of sexual abuse in her youth and witnessing it again in  
 11 college. ECF No. 104 at 1–2.

12 Selvaggio’s December 2021 mailing got no traction and created no public  
 13 debate. ECF No. 105, ¶¶ 69; SDF, ¶ 64 (a Local 367 member posted the flyer in a  
 14 closed, private Facebook group of that local’s dissenters, garnering engagement  
 15 from as few as 17 individuals). Clay then escalated the campaign by having  
 16 Selvaggio engage Emmons to leave flyers in-person at targeted stores in Spokane  
 17 where UFCW members worked. ECF No. 104 at 5–6. Selvaggio discussed the  
 18 engagement with Emmons twice in early January 2022. SDF, ¶ 61.

19

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20<sup>3</sup> Additionally, Renner denies engaging in sexual harassment. SDF, ¶ 10.

1 During those conversations, Selvaggio and Emmons discussed the flyers.  
 2 SDF, ¶¶ 61, 82–86. Emmons instantly recognized the incendiary nature of the flyers’  
 3 accusations and asked Selvaggio for their basis; Selvaggio told him the sexual  
 4 harassment allegations were the subject of investigations, without getting into  
 5 details. *Id.* The two didn’t discuss Guenther’s alleged cover ups, her alleged payoff  
 6 to Gonzalez, or indeed anything about her. *Id.* Even after Emmons read the flyer, he  
 7 did not inquire into Guenther’s alleged coverups or payoffs. *Id.* Emmons nonetheless  
 8 agreed to produce and distribute the flyers, *id.*, without verifying (or even asking  
 9 Selvaggio if he had verified) the allegations. SDF, ¶¶ 77, 82. He did so by printing  
 10 the flyers at a FedEx, driving hundreds of miles from Portland to Spokane, and,  
 11 despite non-solicitation signs at the stores, distributing the flyers on store property  
 12 in places where members were likely to see them, saying “here’s information about  
 13 the union, information about the merger.” SDF, ¶¶ 57, 61.

14 Emmons agreed to take on the flyering job in part because of his personal  
 15 hostility toward anyone accused of sexual harassment. SDF, ¶ 82. He also knew the  
 16 people contracting him to publish the flyers were hostile to Guenther, as the express  
 17 purpose of the project was to oppose the merger she sought. *Id.* He did nothing to  
 18 investigate the allegations against Guenther and did not even inquire into any details  
 19 of the investigations reported to him about Gonzalez or Renner. *Id.* Indeed, by  
 20 inquiring into the basis for the accusations against the alleged harassers but not even

1 asking about the basis for the accusations against Guenther, he deliberately avoided  
 2 the truth regarding her. *Id.*

3 Emmons's flyering harmed Guenther, including by undermining her standing  
 4 among UFCW leaders, causing her anxiety, causing her to move residences at  
 5 significant cost, beefing up security and travel expenses, and incurring expenses for  
 6 professional care. ECF No. 104 at 9–10. It also contributed to her not receiving an  
 7 appointment as an International Vice President—a position that would have come  
 8 with a \$20,000 annual stipend and the prestige of the office. *Id.*<sup>4</sup>

## 9 ARGUMENT

### 10 I. Legal standard on summary judgment

11 Contrary to Emmons's representations (at 2, 15<sup>5</sup>), federal courts sitting in  
 12 diversity evaluate defamation claims at summary judgment without requiring  
 13 convincing clarity. *Miller v. Sawant*, 18 F.4th 328, 336–338 & n. 10 (9th Cir. 2021).  
 14 Familiar summary-judgment standards thus govern this motion. ECF No. 104 at 10.

### 15 II. Guenther is a private figure who need prove only negligence.

16 The parties agree on the elements of defamation under Washington law. ECF

17 <sup>4</sup> Guenther objects to Emmons's reliance (at 6) on her February 2024 letter invoking  
 18 RCW 4.84.250. The applicable statute precludes such an offer from being “filed or  
 19 communicated to the trier of the fact until after judgment . . . .” RCW 4.84.280.

20 <sup>5</sup> All citations to Emmons's brief are to ECF No. 110.

No. 104 at 10–11; ECF No. 110 at 8. Emmons makes no argument about the first element—a false, defamatory factual statement. Instead, he attacks the third element, fault, arguing (at 8–15) Guenther is a limited public figure who must prove actual malice. That argument conflates the test for public-concern speech (relevant to the standard for proof of damages, ECF No. 104 at 18–20) with the test for public controversies (relevant to the standard for fault, ECF No. 104 at 12–16). Under the correct standard, Guenther is a private figure who must prove only negligence.

“Limited-purpose public figures are those who voluntarily inject themselves or are drawn into a public controversy and thereby become public figures for a limited range of issues.” *Clardy v. Cowles Pub. Co.*, 81 Wash. App. 53, 59 (1996). As the party seeking to elevate common-law standards to constitutional ones, Emmons bears the burden to show Guenther is a public figure. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1298–99 (D.C. Cir. 1980) (looking to evidence submitted by defendant). “Because the designation of a person as a ‘public figure’ results in a decrease of the protections against invasions of privacy and defamation of character provided by law, such a designation should not be made lightly.” *Tilton v. Cowles Pub. Co.*, 76 Wash. 2d 707, 716 (1969).

The heart of the inquiry is “whether the plaintiff has voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy.” *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001)

(cleaned up). That inquiry turns, as a threshold matter, on the existence and contours of a public controversy. *Waldbaum*, 627 F.2d at 1296–97; *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553–55 (4th Cir. 1994). If a public controversy exists, courts then examine five factors to guide the inquiry further: whether (1) the plaintiff has access to the media and channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public-figure status at the time of the alleged defamation. *Clardy*, 81 Wash. App. at 60, 64–65 (adopting *Foretich* factors). Here, Emmons fails at the threshold.

**A. No public controversy about the merger predated Emmons's flyering, so Guenther isn't a limited public figure regarding the merger.**

The inquiry begins with courts exercising care to identify and isolate the  
13 “public controversy.” *Waldbaum*, 627 F.2d 1287. Not all “controversies of interest  
14 to the public” are “public controversies” for constitutional purposes. *Time, Inc. v.*  
15 *Firestone*, 424 U.S. 448, 454 (1976) (individual dragged into public eye through  
16 litigation, private figure, even though newsworthy). Instead, “a public controversy  
17 is a dispute that in fact has received public attention because its ramifications will  
18 be felt by persons who are not direct participants.” *Waldbaum*, 627 F.2d at 1296. It  
19 “must be a real dispute, the outcome of which affects the general public or some  
20 segment of it.” *Makaeff v. Trump University, LLC*, 715 F.3d 254, 267 (9th Cir.

1 2013). “To determine whether a controversy indeed existed and, if so, to define its  
 2 contours, the judge must examine whether persons actually were discussing some  
 3 specific question” and debating it “publicly” with “foreseeable and substantial  
 4 ramifications for nonparticipants . . . .” *Waldbaum*, 627 F.2d at 1297. Courts  
 5 emphasize whether “the press was covering the debate, reporting what people were  
 6 saying and uncovering facts and theories to help the public formulate some  
 7 judgment.” *Waldbaum*, 627 F.2d at 1297.

8       Here, no such public controversy or debate existed before Emmon’s January  
 9 8, 2022, publication. Neither local waged a public campaign on the merger. *Supra*  
 10 at 3. The press did not cover the potential merger until after it was completed. *Id.*  
 11 And Emmons produced no evidence of a public debate at all on the topic. *Id.* The  
 12 closest evidence he offers is a single social media post in December 2021. *Supra* at  
 13 4. That post does not show a **public** debate because it was posted in a private  
 14 Facebook page, limited to Local 367 dissenters, and garnered responses from as few  
 15 as 17 individuals. *Id.* Guenther did not inject herself into the discussion on the Local  
 16 367 dissenters’ Facebook site nor did she otherwise respond publicly to that post.  
 17 SDF, ¶ 91. And there is no evidence the lone post in a private Facebook page  
 18 generated any debate among the affected UFCW members. *Supra* at 4.

19       This solitary online engagement in a private forum of members unaffected by  
 20 the Local 21/1439 merger does not establish a public controversy. *See D.C. v. R.R.*,

1 182 Cal. App. 4th 1190, 1230 (2010), *as modified* (Apr. 8, 2010) (“If [an online]  
 2 message was of interest to only a private group, organization, or community, it was  
 3 not part of an ongoing controversy, dispute, or discussion, such that its protection  
 4 would encourage participation in matters of public significance.”).

5 Additional undisputed evidence refutes the existence of any public  
 6 controversy over the merger. Clay directed Selvaggio to hire Emmons to conduct in-  
 7 person flyering precisely because the earlier mailing did not generate the debate Clay  
 8 and Selvaggio had sought. *Supra* at 4. Even after Emmons’s flyering, only 0.8% of  
 9 affected members voted, ECF No. 105, ¶¶56–60—a paltry number insufficient to  
 10 elevate common-law fault standards to stringent constitutional requirements.

11 Unable to show an actual debate existed before his January 2022 flyering, as  
 12 required by *Time, Inc., Makaeff, Waldbaum*, and other authority, Emmons sidesteps  
 13 the issue by urging the Court (at 9–11) to follow the test for public-concern speech.  
 14 That test applies to anti-SLAPP statutes, whose terms expressly protect speech  
 15 connected to “an issue of public concern,” ECF No. 110 at 10 (citing several such  
 16 cases), and to constitutional requirements for proof of damages in defamation  
 17 actions, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–63  
 18 (1985) (speech on “matters of public concern” can change requirements for proof of  
 19 damages). It is wholly irrelevant to the public-figure determination tied to fault.  
 20

1     *Time, Inc.*, 424 U.S. at 454 (rejecting attempted equation of “public controversy”  
 2     with controversies of interest to the public and requiring an active public debate).

3                 Emmons next argues (at 12–13) that Guenther’s mere status as Local 21  
 4     President who pursued the merger privately makes her a public figure. But his cited  
 5     authorities all involve public speech by plaintiffs engaged in active, public debates.  
 6     *Cf., Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 927 (9th Cir. 2022) (charity and its  
 7     director public figures “with respect to their use of charitable funds” based on regular  
 8     engagement “with the press in an effort to cultivate a public image, including by  
 9     issuing press releases, hosting galas, and publicizing itself to thousands of followers  
 10    through social media” and aggressive solicitation of “donations from the public”);  
 11    *Materia v. Huff*, 475 N.E.2d 1212, 1215 (1985) (union president limited-public  
 12    figure with respect to qualifications of office based on public reelection campaign).  
 13    In contrast, here Guenther took no public action to campaign for the merger. *Supra*  
 14    at 3. She did not host public meetings, issue press releases, or use social media to  
 15    discuss the merger. *Id.* Emmons’s citations do not apply.

16                 Emmons also overreads (at 13–14) *Jacoby v. Cable News Network, Inc.*, 2021  
 17    WL 5858569 (11th Cir. Dec. 10, 2021) and other authority, as establishing the  
 18    proposition that a plaintiff can become a public figure by silently influencing a non-  
 19    publicly-debated matter behind the scenes. Such a holding would flout *Gertz v.*  
 20    *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Wolston v. Reader’s Digest Ass’n*,

1 443 U.S.157, 161–69 (1979); *Hutchinson*, 443 U.S. at 133–36; and *Time, Inc.*, 424  
 2 U.S. at 453–57. See ECF No. 104 at 13. Instead, *Jacoby* found the plaintiff there a  
 3 limited public figure because “he was widely known to the public, he had been  
 4 publicly linked to a number of high-profile scandals of public interest, he availed  
 5 himself of privileged access to the ... media in an effort to present his own side of  
 6 the story, and he was in close proximity to those in power.” *Jacoby*, 2021 WL  
 7 585869 at \*4 (cleaned up). See also *Charles v. McQueen*, 693 S.W.3d 262, 276–78  
 8 (Tenn. 2024) (homeowners’ association engaged in public debate through  
 9 widespread communications with residents about development plan and meeting  
 10 with public officials concerning those issues); *Carr*, 259 F.3d at 280–82 (real estate  
 11 developer engaged in public debate over two public projects by inviting public  
 12 attention regarding them through attendance at public meetings, public support for  
 13 the project, editorials, and quotes in local media on one of the projects). Unlike the  
 14 *Jacoby*, *Charles*, and *Carr* plaintiffs, Guenther did not inject herself into a public  
 15 debate on the Local 21/1439 merger. Nor could she—there was no such public  
 16 debate.

17       Ultimately, no public controversy predated Emmons’s flyering, so Guenther  
 18 did not inject herself into any such controversy to attempt to influence its resolution;  
 19 she did not voluntarily assume any prominent role in the non-existent controversy;

1 and she did not retain that public-figure role throughout the controversy until the  
 2 defamation. She is not a public figure. *Clardy*, 81 Wash. App. at 60, 64–65.

3 **B. Guenther did not regularly and continually access channels of  
 4 communication regarding the merger.**

5 Unable to prevail on the core public-figure factors, Emmons emphasizes (at  
 6 11–13) Guenther’s communications. This factor is so secondary that courts often  
 7 resolve the public-figure question without analyzing it. *See, e.g., Makaeff*, 715 F.3d  
 8 at 266 (omitting factor from test). When considered, only “regular and continuing  
 9 access to the media” is constitutionally significant. *Hutchinson v. Proxmire*, 443  
 10 U.S. 111, 136 (1979). That access must be sufficiently easy to enable the plaintiff to  
 11 garner media coverage on topics of her choice to publicly rebut defamation. *See*  
 12 *Carr*, 259 F.3d at 282 n.2; *Harris v. Quadracci*, 48 F.3d 247, 251 (7th Cir. 1995).

13 Guenther had no heightened, regular, or continuing access to the media. Over  
 14 a three-year period, she spoke at ten press conferences, all about issues of  
 15 extraordinary national or statewide importance. SDF, ¶¶ 87–94, 98. Guenther never  
 16 sought press attention on internal union affairs, like the merger, and there is no  
 17 evidence she could have gotten media attention on those topics if she had tried. *Id.*

18 Emmons’s authorities (at 11) are thus easily distinguishable. *See Dunlop-*  
*19 McCullen v. Rogers*, 2002 WL 1205029, at \*9 (S.D.N.Y. Feb. 21, 2002) (editor of  
 20 union’s newspaper, with final authority over content, conceded public figure status);  
*Henry v. Nat’l Ass’n of Air Traffic Specialists, Inc.*, 836 F. Supp. 1204, 1206 & n. 6

(D. Md. 1993), *aff'd*, 34 F.3d 1066 (4th Cir. 1994) (union official, who sent “volley of open letters” to influence membership, conceded actual malice applied); *Cox v. Galazin*, 460 F. Supp. 2d 380, 389 (D. Conn. 2006) (union officer’s embezzlement “invited scrutiny by the membership”); *Guam Fed’n of Teachers, Local 1581 v. Israel*, 492 F.2d 438, 439 (9th Cir. 1974) (accepting public-figure concession). Unlike those cases, Guenther does not concede she was a public figure and did not use Local 21’s communication channels or the media to publicly influence the merger vote, and Emmons is not a UFCW member whose scrutiny can reasonably be expected. *Supra* at 3; ECF No. 26, ¶¶ 3.31–3.33; ECF No. 21, pp. 9–10.

### **III. Even if Guenther had to prove actual malice, this record requires trial on that issue.**

Emmons next mistakenly argues (at 15–16) Guenther has no evidence of actual malice. Actual malice means a defendant published a defamatory statement either knowing its falsity or recklessly disregarding its falsity. *Duc Tan v. Le*, 177 Wash. 2d 649, 668–69 (2013) (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). A plaintiff can show such malice through circumstantial evidence, including a defendant’s hostility or spite, knowledge that a source of information about a plaintiff is hostile towards the plaintiff, and failure to properly investigate an allegation. *Id.* at 669. Additionally, “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports,” including evidence “of intent to avoid the truth . . . .” *Id.* (quoting *St.*

1       *Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

2           This record presents enough circumstantial evidence of Emmons's actual  
 3 malice to require trial on that question, if relevant. He admitted personal hostility  
 4 toward anyone accused of sexual harassment such that he "really didn't need to hear  
 5 much more" than bare accusations to agree to spread the flyer. SDF, ¶ 82. He knew  
 6 the sources of information for the flyer were hostile to Guenther but did nothing to  
 7 investigate or verify the flyer's accusations. *Id.* He did not ask for any details about  
 8 the investigations represented to him—all he needed was the bare claim that  
 9 investigations occurred, regardless of who was targeted or what the investigations  
 10 concluded. *Id.* He deliberately avoided the truth regarding Guenther, asking for  
 11 support for the accusations against others but not against her. *Id.* And, while  
 12 circulating the flyers, he disguised himself by wearing a recently purchased ballcap  
 13 of a local college team and covering his face after dark. ECF No. 105, ¶¶ 86–88.

14       **IV. Emmons was no mere conduit but independently published the flyer  
          and is liable for its resulting harm.**

15           Emmons next contends (at 16–18) he is a mere conduit not responsible for the  
 16 flyers' content. Unlike publishers, passive distributors (like "newsstands and  
 17 libraries") generally are not liable for content they distribute. *Malwarebytes, Inc. v.  
          Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020). That distinction does  
 18 not aid Emmons, however, because he published the challenged flyer. A person  
 19 publishes a communication by intentionally or negligently communicating it to  
 20

anyone “other than the person defamed.” Restatement (Second) of Torts § 577(1). *Accord id.*, cmt. a (any “act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication”); *Corbin v. Madison*, 12 Wash. App. 318, 326 (1974) (same). In Washington, as elsewhere, a person who “republishes defamatory statements made by another does not escape liability for the defamation . . . .” *Herron v. Trib. Pub. Co.*, 108 Wash. 2d 162, 178 (1987) (11 p.m. rebroadcast of statement originally aired during 5:30 p.m. newscast, separate publication); Restatement (Second) of Torts § 578 cmt. b (republishers are liable to the same extent as original publishers). This rule effectuates the “theory that tale bearers are as bad as tale makers.” *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (cleaned up).

Unlike newsstands or librarians who are in the business of distributing media regardless of its content, Emmons is in the business of targeting specific communications to specific audiences. SDF, ¶¶ 6–7. That’s exactly what he did here: he discussed the flyer’s content with Selvaggio, read it himself, brought the flyers into physical existence by printing them, drove hundreds of miles to the stores where UFCW members worked, placed the flyers where his intended audience would likely read them, and told them the flyers were about their union. *Supra* at 4–5.

Emmons’s reliance on *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928 (E.D. Wash. 1992) and other passive distributor cases is far afield. Those cases shield only those

1 distributors who do not know—and have no reason to know—the contents of  
 2 communications before circulating them. *See Auvil*, 800 F. Supp. at 931–32 (local  
 3 CBS affiliates not liable for national broadcast where affiliates had no “hint … that  
 4 the content would be defamatory”); Restatement (Second) of Torts § 581, cmt. c  
 5 (deliverers not liable for meanings they have “no reason to know” but rule “does not  
 6 relieve from liability the publisher who prints and puts upon the market a libelous  
 7 [communication] even though its contents are prepared by a third person”).<sup>6</sup>

8       Here, Emmons knew the flyer carried a defamatory meaning when he first  
 9 discussed it with Selvaggio and again when he read it himself. *Supra* at 4. Of course  
 10 he did: the flyer is defamatory per se. ECF No. 21 at 11; *Caruso v. Local Union No.*  
 11 *690*, 100 Wash. 2d 343, 353 (1983); *Ward v. Painters' Loc. Union No. 300*, 41  
 12 Wash.2d 859, 863–65 (1953). He nonetheless chose to target that defamatory flyer  
 13 at the audience most likely to impact Guenther’s reputation. He is no passive  
 14 distributor.

15 **V. Emmons’s flyering harmed Guenther.**

16       Emmons rightly acknowledges (at 18) Guenther may establish damages either  
 17 by showing (1) the flyers’ accusations were defamatory per se and Emmons had  
 18

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19       <sup>6</sup> *Accord Carafano v. Metrosplash, Inc.*, 207 F. Supp. 2d. 1055, 1074 (C.D. Cal.  
 20 2002) (holding website liable where questionnaires made it aware of profile content).

1 actual malice or (2) she suffered actual injuries. He vainly contests both points.

2 On the first point, the Court already correctly held the accusations against  
 3 Guenther are defamatory per se. *See* ECF No. 21 at 11; *Caruso*, 100 Wash. 2d at 353.  
 4 And the record presents at least triable questions on Emmons's actual malice. *Supra*  
 5 at 14–15. Emmons nonetheless contends (at 18) Guenther is barred by RCW  
 6 7.96.050 from obtaining reputational or presumed damages otherwise available for  
 7 per se defamation.

8 Emmons misreads that statute to impose an unspecified timing requirement  
 9 that, he contends, Guenther missed, forever barring her from obtaining certain  
 10 damages. In fact, unlike parallel statutes in other states (Tex. Civ. Prac. & Rem.  
 11 Code §73.056(a)), Washington's statute imposes no such deadline.<sup>7</sup> Instead, it  
 12 imposes a timing consequence: the defendant's obligation to clarify or correct is  
 13 tolled until 30 days after the production of falsity information. RCW 7.96.070(1).

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14  
 15  
 16  
 17 <sup>7</sup> The statute prescribes timeliness requirements a dozen times elsewhere. *See* RCW  
 18 7.96.040(1)(a), .040(2), .060, .070(1), .070(4)(a), .070(5), .080(1)(2), .090(1), and  
 19 .100. The Legislature's failure to impose a deadline on producing falsity information  
 20 shows it intended no such deadline.

1 Here, Guenther provided falsity information in her complaint,<sup>8</sup> again during written  
 2 discovery completed by May 12, 2024, SDF, ¶ 115, and yet again through her May  
 3 13 and June 6, 2024, depositions (ECF No. 97, ¶ 4), giving him until July 6, 2024,  
 4 at the latest to correct or clarify his defamatory statements. As he has not done so,  
 5 SDF, ¶ 115, RCW 7.96.050 provides no barrier to Guenther's recovery of all  
 6 available damages. Emmons's contrary reading would impose a strict, unspecified  
 7 deadline for providing falsity information—precisely the technical trap for unwary  
 8 plaintiffs the statute eschews. RCW 7.96.010; UCCDA § 3, cmt., available at  
 9 <https://tinyurl.com/mry2cbr4>.

10 On the second point, the flyers caused Guenther actual damage. *See* ECF No.  
 11 104 at 9–10, 23–24. Emmons would evade that showing (at 19) on the theory that  
 12 Selvaggio's previous publication of the same flyer somehow immunized him from  
 13 liability for the resulting damages. But republishers are liable for damages “to the  
 14 same extent as” the original publishers. Restatement (Second) of Torts § 578 cmt. b.  
 15 *Accord Herron*, 108 Wash. 2d at 178; *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th  
 16 Cir. 2002) (It is “a venerable principle that a person who repeats a defamatory  
 17 statement is generally as liable as the one who first utters it.”). *Schmalenberg v.*  
 18

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19<sup>8</sup> Defamation complaints themselves may serve as requests for clarification. RCW  
 20 7.96.040(4). They thus can also provide falsity information under RCW 7.96.050.

*Tacoma News, Inc.*, 87 Wn. App. 579, 593 (1997)—urged (at 19) by Emmons—has nothing to do with a republisher’s liability and is inapplicable here.

## **VI. Emmons is not entitled to judgment on Guenther's false light claim.**

“An invasion of privacy by false light arises when a defendant publishes statements that place a plaintiff in a false light if (1) the false light would be highly offensive and (2) the defendant knew of or recklessly disregarded the falsity of the publication and the subsequent false light it would place the plaintiff in.” *Seaquist v. Caldier*, 8 Wn. App. 2d 556, 564 (2019). Here, the false allegations against Guenther are highly offensive. And there is ample evidence that Emmons acted with actual malice. *Supra* at 14–15. A jury must decide Guenther’s false light claim.

## CONCLUSION

For the reasons set forth above and in her cross-motion, Guenther respectfully asks the Court to deny Defendants' motion for summary judgment.

RESPECTFULLY SUBMITTED this 25th day of October 2024.

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PLAINTIFF'S OPP. TO DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT–20  
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## **DECLARATION OF SERVICE**

I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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DATED this 25th day of October 2024 at Seattle, Washington.

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